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No. 82-627

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1982

JAMES M. THOMSEN, TRAVIS GATUS, JOHN M. BRENNAN,
JERALD R. JAKL, LARRY R. JOHNSON,
ANTHONY T. PELLEGRINO,
Petitioners,

VS.

WESTERN ELECTRIC CO., INC., THE PACIFIC TELEPHONE
AND TELEGRAPH COMPANY, AMERICAN TELEPHONE
AND TELEGRAPH COMPANY,
Respondents.

PETITIONERS' REPLY BRIEF

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ARGUMENT

Respondents' initial assertion— "petitioners' statement of the facts contains many assertions not supported by the record" (Opp. Br., p. 1)—is, in fact, *not* supported by the record.

Respondents' rendition of "relevant facts" (Opp. Br., pp. 1-2) misapplies basic standards of appellate review. Because the District Court granted summary judgment against petitioners, it is petitioners' version of the facts—not that of respondents—which is to be accepted by this Court. *Bishop v. Wood*, 426 U.S. 341, 347 (1976). The correct standard is that the record below is to be examined in the light most favorable to petitioners to determine the existence of a triable issue of material fact. *United States v. Diebold*, 369 U.S. 654, 659 (1962); *Poller v. Columbia Broadcasting System*, 368 U.S. 464, 473 (1962).

Respondents' statement that "the Bell System is 'centrally managed by AT&T' and 'virtually all important policies are centrally developed' reaching all parts of the Bell System' " (Opp. Br., p. 2) implies that the agreements here at issue originated with AT&T and comprised common policy. But the record clearly contradicts the position taken by respondents and the Ninth Circuit. The record contained the following deposition testimony of Mr. T.J. Saenger, president of Pacific Telephone:

> "Q. Do you, as President of Pacific Telephone, receive directives from AT&T as to how to administer certain areas of your responsibility?
>
> "A. Your term is too precise. The term "directive" is too precise. We get input. We have suggestions. We get practical suggestions, staff input. And then it is up to PT&T to accept, reject, modify.

(R. 1166)

* * * * * * * * *

"Q. PT&T receives advice from AT&T and then makes its own decision as to what course to take. Is that a fair summary?

"A. That's a general fair summary of the situation".

(R. 1166-67).

AT&T does not manage the operations of Western Electric's installation division in Northern California: AT&T has not issued any directives to that division during the past ten years. (R. 1308).

AT&T did not "develop" the agreements between Western Electric and Pacific Telephone to blacklist and to boycott petitioners from all employment opportunities with Pacific Telephone. The history of the restraints proved the exact opposite; Western Electric, acting alone, coerced Pacific Telephone into the challenged agreements. This history and Western Electric's motive for enlisting the agreements is stated in an intra-company memorandum from a local manager to the regional manager of Western Electric's installation division in Northern California and Western Nevada, dated October 26, 1978.

"On October 23, 1978, I was advised that Telephone Company plant personnel have been actively recruiting our installers for hire in the Pacific Company. C.A. Robert [another local Western Electric manager] also had a recent similar situation.

"I contacted Ken Stevens, Division Manager-Employment for the Pacific Company—Northern Region; and he indicates they must hire our installers if they are the most qualified.

"Since I have already had one installer give notice and several others that have been contacted and are considering hiring on with Pacific Company, I decided to alert J.J. Polosky [Western Electric administrative

> officer for Western Region] on October 24. I suggest we discuss this situation and follow up on whatever arrangement we might deem feasible to prevent ongoing recruiting and the loss of skilled installers."

(R. 1584).

Mr. Roberts of Western Electric then contacted Mr. Stevens of Pacific Telephone and stated Western Electric would raid skilled employees of Pacific unless Pacific agreed to stop its recruiting and offers of employment to craftspersons employed by Western Electric. (R. 1805-06).

On November 2, 1978, Pacific Telephone reversed its "best qualified" criteria for hiring individuals employed by Western Electric—the criteria recommended by the parent company (AT&T) several weeks earlier. (R. 1752, 1757). A business record of Pacific Telephone admits two of the challenged restraints then imposed:

> "A job offer *will not* be made to a Western Electric employee without obtaining approval for release from his/her supervisor . . .
>
> "In addition, *former* Western Electric employee should not be rehired by us unless six months has elapsed since their date of resignation from Western Electric." (R. 1752) [Emphasis in original].

On November 28, 1978, another directive of the employment division of Pacific Telephone substituted the "release" device with a categorical ban against contracting with any individual employed by Western Electric. The directive states:

> "Effective immediately, do not contact Western Electric supervisors to obtain release dates . . .
>
> "This means that applications from current Western Electric employees will be accepted and placed in our pending files. However, we will not consider these people for employment as long as they are still em-

ployees of Western Electric or have resigned from Western Electric within the past six months." (R. 1756).

Pacific Telephone's records also admit a "verbal agreement between Western Electric and PT&T that we will not consider hiring any Western Electric employee for any of our job openings" (R. 1588) *and* a "long-standing agreement "between Western and Pacific whereby Pacific will not engage former employees unless six months has expired from the date of resignation from Western Electric. (R. 1617).

The record thus controverts respondents' erroneous assertion that the restraints arose from a centralized policy handed down by the parent company. The evidence discloses one subsidiary corporation enlisted a second into agreements not to trade with third persons for the purpose of eliminating all actual and potential competition in markets where respondents possess 95% monopoly power.

Respondents' attempt to create the impression that the Ninth Circuit applied substantive standards of Sherman Act § 1 analysis to the challenged agreements (Opp. Br., p. 3) is belied by a reading of the decision. The opinion makes clear the finding of "common enterprise" constituted the explicit premise and sole basis for the determination that the challenged agreements were "matters of internal policy" and therefore produced no anticompetitive as a matter of law. (Pet.Appx., pp. 10b, 16b-17b).

I. The Challenged Agreements Did Violate § 1 of the Sherman Act. The Decision of the Ninth Circuit Is Not Consistent With the Decisions of this Court or the Courts of Appeals

Although respondents contend the decision below is "consistent with the decisions of this Court and the Courts of Appeals" (Opp. Br., p. 4), they fail to cite a single decision of any Court of Appeals to sustain their position. This is so because there is no decision by any Court of Appeals which, as here, holds restraints per se lawful upon finding corporations "so closely affiliated as to comprise a common enterprise." (Pet.Appx., pp. 16b-17b). In fact, the decision below is in direct and irreconcilable conflict with the decisions of the Second,[1] Third[2] and Fifth Circuits.[3]

Respondents erroneously contend the decision of the Ninth Circuit is consistent with three applicable decisions of this Court.[4] (Opp. Br., p. 5). Respondents' erroneous premise is that *Kiefer-Stewart* limited § 1 liability to situations in which separate, affiliated corporations "held themselves out as competitors". (Opp. Br., p. 6). No such limitation can be found in *Kiefer-Stewart*. This Court held:

> "Respondents next suggest that their status as 'mere instrumentalities of a single manufacturer-merchandising unit' makes it impossible for them to have con-

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[1] *North American Soccer v. National Football League*, 670 F.2d 1249, 1257 (2d Cir. 1982), cert. pending, Case No. 81-2298.

[2] *Columbia Metals v. Kaiser Aluminum*, 579 F.2d 20, 33-34 (3d Cir. 1978), cert. denied, 439 U.S. 876 (1978); *Cromer Co. v. Nuclear Materials & Equip. Co.*, 543 F.2d 501, 511-12 (3d Cir. 1976); *Coleman Motor Co. v. Chrysler Corp.*, 525 F.2d 1338, 1345 (3d Cir. 1975).

[3] *H & B Equipment Co., Inc. v. International Harvester*, 577 F.2d 239, 244-45 (5th Cir. 1978).

[4] *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons., Inc.*, 340 U.S. 211 (1951); *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134 (1968); *United States v. Yellow Cab Co.*, 332 U.S. 218 (1947).

spired in a manner forbidden by the Sherman Act. But this suggestion runs counter to our past decisions that common ownership and control does not liberate corporations from the impact of the antitrust laws. E.G., United States v. Yellow Cab Co., 332 U.S. 218, 67 S.Ct. 1560, 91 L.Ed. 2010. The rule is especially applicable where, as here, respondents hold themselves out as competitors." *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc., supra,* 340 U.S. 211, at 215.

Moreover, the defendants in *Perma Life Mufflers* were not, and did not hold themselves out, as competitors. This Court, nevertheless, held noncompeting parent and subsidiary corporations capable of conspiracy to violate the Act. 392 U.S. at 141-142. And in *Yellow Cab,* this Court expressly rejected the assertion of a single-trader defense by members of a "vertically related enterprise." 332 U.S. 218, 227.

The factual matrix presented by this case is more compelling than *Kiefer-Stewart, Perma Life Mufflers,* or *Yellow Cab.* Western Electric and Pacific Telephone were actual competitors in two markets in which they jointly possessed 90% market shares. (R. 1130, 1296-97, 1405, 1407, 1426-27, 1816). That they competed in the market for craftspersons' services is demonstrated above at pp. 2-3. That they competed and were potential competitors in the market for sale of installation services is admitted in business records of Western Electric.[8]

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[8]Western Electric's national "Five Year Plan", dated April 10, 1978, states in pertinent part:

"The potential competition with the telephone companies may extend to all areas of our work and losses are already severe in the PBX line." (R. 1445).

Western Electric's marketing plan, also prepared in 1978, states: "We must provide greater assistance than is normally needed since we are attempting to break into a market where the toughest competitor is the Telco itself." (R. 1540).

Further, evidence presented by petitioners demonstrated anticompetitive purpose and effect. There is no logic or factual basis for respondents' statement that the restraints were not intended to restrain trade other than between Western Electric and Pacific Telephone (Opp. Br., p. 6). The challenged agreements were intended, and did, restrain trade between Pacific Telephone and two distinct groups of independent traders: (1) 1250 individuals employed by Western Electric in Northern California and Western Nevada (R. 1584, 1752, 1756, 1617, 1805-06); and (2) competing sellers of telecommunications services. (R. 1502). Western Electric and Pacific Telephone have admitted the challenged agreements are illegitimate and/or anticompetitive. The record contains a document from the files of Pacific Telephone, *which states:*

> "The requirement for a six month lapse since employment with Western Electric has not been valid for several years and, in fact, is illegal . . . There is *no* union agreement covering this matter." (R. 1624) [Emphasis in original].

The record also contains a document from the files of Western Electric's national personnel director which states:

> "For example, one such rule seems to imply that employees seeking employment with another Bell System Company must resign and wait six months before employment can begin with the other Bell Company. This 'rule' has no official sanction. It is contrary to the right of an employee to seek employment elsewhere in the Bell System or in any other company." (R. 1634-35).

The record also showed an admission by the Board Chairman of Pacific Telephone during 1978 that the "release" agreement was "inconsistent" with official company policy of Pacific Telephone (R. 1355-57).

The erroneous assertion of respondents that the Ninth Circuit did review petitioners' evidence (Opp. Br., pp. 5-6) cannot withstand review of the decision. As respondents' own statement of "relevant facts" makes clear (Opp. Br., pp. 1-2), the only evidence reviewed was that of common ownership and five elements of common control. (See also, Pet.Appx., pp. 10b-12b). Even the proponents of some "internal management rule" recognize limits to the label; as pointed out by Professor L.A. Sullivan, the commentator who coined the "internal management" phrase:

> "At some point a diminished level of business integration between two related corporations will warrant a conclusion that they are two firms even though there are some elements of common ownership and control." Sullivan, *Antitrust* (1977), p. 328.

Not only did the decision below fail to consider petitioners' proof negating common control and functional integration, but the decision did not address any of the material facts of Sherman Act § 1 liability, viz., nature and necessary effects of the challenged agreements and the circumstances surrounding their formation and operation. *Nat. Society of Professional Engineers v. United States,* 435 U.S. 679, 692 (1978). Respondents have not even attempted analysis of the material facts laid down by this Court in *Nat. Society.*

II. The Express Language of the Decision Below Confines Standing Under § 2 of the Sherman Act to Customers and Competitors of the Violator. The Casual Connection Between the Challenged Agreements and § 2 Offenses Is Direct

Respondents erroneously construe the Ninth Circuit decision in urging standing was not limited to customers and competitors of Western Electric (Opp. Br., p. 6). The language of the decision cannot be interpreted any other way:

"The employees did not compete or purchase from Western, so they were not the target of the alleged violation. Any injury suffered was incidental." (Pet. Appx., pp. 14b-15b).

Respondents also err in arguing absence of causal connection between the challenged agreements and the attempt and monopolization offenses alleged against Western Electric. (Opp. Br., p. 7). The record showed the challenged restraints were a wrongful means of suppressing labor costs and installation prices, thereby preventing competing sellers of specialized business services from trading with Pacific Telephone. (R. 1502, 1450-59, 1464-65, 1466-68, 1584, 1805-06). This Court has recognized the factual nexus between exclusion of individuals from free markets in which to sell their services and their employer's acquisition or preservation of monopoly power in the related market where those services are sold by the employer. *Radovich v. National Football League*, 352 U.S. 445, 454 (1957).

CONCLUSION

This case raises questions vital to enforcement of federal antitrust laws. The question of ability of separate corporations affiliated by common ownership and control to conspire within the meaning of the Sherman Act has resulted in conflicting tests among the Circuits.[6] Only the Second, Third and Fifth Circuits follow applicable decisions of this Court. This question is bound to recur with the ever-increasing concentration in the national economy. The standing decision directly contravenes decisions of this

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[6]The Seventh and Eighth Circuits find ability to conspire only if affiliated corporations hold themselves out as separate entities. *Havoco of America, Ltd. v. Shell Oil Co.*, 626 F.2d 549, 554 (7th Cir. 1980); *Ogilvie v. Fotomat Corp.*, 641 F.2d 581, 589 (8th Cir. 1981).

Court,[7] and represents a sharp departure from the common law tradition incorporated into the Sherman Act. The principle that each individual reap the benefits of his or her unique talents free from monopolistic restraints is fundamental to the fabric of a democratic, free society.

All questions presented are ripe for review by this Court. The writ of certiorari should be granted and the decision of the Ninth Circuit reversed.

Respectfully submitted,

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[7] *Blue Shield of Virginia v. McCready*, ... U.S. ..., 102 S.Ct. 2540, 25 2545 (1982); *Radovich v. National Football League, supra*, 352 U.S. 445, 454; *Mandeville Island Farms v. Sugar Co.*, 334 U.S. 219, 236 (1948).